

**MF 03-1**

**Tax Type: Motor Fuel Use Tax**

**Issue: Dyed/Undyed Diesel Fuel (Off Road Usage)**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**ABC TILE  
Taxpayer**

**Docket # 02-ST-0000**

**Barbara S. Rowe  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Mr. Kent Steinkamp, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

The Illinois Department of Revenue (hereinafter "Department") issued a Notice of penalty for Dyed Diesel Fuel Violation to ABC TILE (hereinafter "Taxpayer"). The notice alleges that taxpayer failed to display the required notice, "Dyed Diesel Fuel, Non-taxable Use Only," on a container, storage tank, or facility owned and operated by taxpayer. Taxpayer timely protested the notice and an evidentiary hearing was held. After reviewing the record, it is recommended that the matter be resolved in favor of taxpayer.

### **FINDINGS OF FACT:**

1. Taxpayer is in the construction business. On May 9, 2002, taxpayer failed to display the required notice “Dyed Diesel Fuel, Non-taxable use only, ” on its container/storage tank that is used to store or distribute dyed diesel fuel. (Dept. Ex. Nos. 1, 2)

2. On June 21, 2002 the Department issued a Notice of Penalty for Dyed Diesel Fuel Violation to the taxpayer showing a penalty due of \$2,500 for its failure to display the required notice on its tank on May 9, 2002. The Notice was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. No. 2)

3. Taxpayer’s distributor and supplier has serviced taxpayer’s above ground fuel storage tanks since 1985. The distributor provided decals to identify the contents of the tanks, which have been displayed according to regulations. (Taxpayer’s Ex. No. 1)

4. Taxpayer was in the process of painting its tanks on May 9, 2002. The second coat had been applied the day of the inspection. Two coats of paint have been applied and a third is still needed. (Taxpayer’s Ex. Nos. 1, 2; Tr. pp. 9-10)

5. The decals were removed during the sandblasting that preceded the painting. (Taxpayer’s Ex. No. 2)

### **CONCLUSIONS OF LAW:**

Section 21 of the Motor Fuel Tax Act (hereinafter the “Act”) (35 ILCS 505/1 *et seq.*) incorporated by reference section 5 of the Retailers’ Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department’s determination of the amount owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount due. 35 ILCS 505/21; 120/5. Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to

prove by sufficient documentary evidence that the assessment is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1<sup>st</sup> Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill.App.3d 1036, 1039 (2<sup>nd</sup> Dist. 1978).

Section 4f of the Act, which became effective January 1, 2000, provides as follows:

A legible and conspicuous notice stating “Dyed Diesel Fuel, Non-taxable Use Only, Penalty for Taxable Use” must appear on all containers, storage tanks, or facilities used to store or distribute dyed diesel fuel. (35 ILCS 505/4f)

Subsection 14 of Section 15 of the Act provides as follows:

14. Any person who owns, operates, or controls any container, storage tank, or facility used to store or distribute dyed diesel fuel without the notice required by Section 4f shall pay the following penalty:

First occurrence.....\$500

Second and each occurrence thereafter.....\$1,000 (35 ILCS 505/15)

The Department’s *prima facie* case was established by the admission into evidence of the Notice of Penalty liability. In response, the taxpayer presented affidavits by its supplier and painter that taxpayer was in the process of painting its storage tank. As part of that process the decal had been sandblasted off. Prior to that, taxpayer had the required decals to identify the contents of the tank. Taxpayer was not finished with the painting at the time it was issued the citation. (Taxpayer Ex. Nos. 1,2) At all other times, taxpayer displayed the required notice. I therefore find that taxpayer has overcome the Department’s *prima facie* case. The \$2,500 penalty should therefore be dismissed.

For the foregoing reasons, it is recommended that the \$2,500 penalty for failure to display the notice be dismissed.

Date: January 7, 2003

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Barbara S. Rowe  
Administrative Law Judge